REPORT OF THE COMMITTEE ON S.J.C. RULE 3:10 AND RELATED MATTERS TO THE JUSTICES OF THE SUPREME JUDICIAL COURT

MARCH 9, 1992

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TO: The Justices of the Supreme Judicial Court

FROM: The Court's Rule 3:10 Committee

REPORT

The Court appointed this committee, whose members are listed in Appendix A, to consider generally the process by which, under S.J.C. Rule 3:10 concerning the "Assignment of Counsel," the judicial department determines whether a criminal defendant or a party to a civil action requires the appointment of counsel at public expense. Specifically, we have been most concerned with defining those parties who should be treated as Indigent and Indigent but Able to Contribute.

General Background

The Committee has spent a major portion of its time, working in part through a subcommittee on the drafting of a new Rule 3:10, considering what changes should be made in that rule. It became apparent early in the Committee's deliberations that the then recent large increase in the cost to the Commonwealth of providing counsel to indigent defendants was in large measure attributable to an increase in crime in the Commonwealth and not

to problems in the workings of Rule 3:10.[1] It was also clear that the cost per case of providing counsel in Massachusetts has been below the national average.[2] It took us somewhat longer to conclude that the proportion of all defendants for whom counsel was provided at public expense does not appear to be significantly greater in Massachusetts than the national average.

There is a considerable disparity among District and Municipal Courts in the proportion of criminal cases in which counsel is appointed. We think that the variation is largely, if not entirely, attributable to the economic status of the mix of defendants in the particular courts. We suspect, however, that

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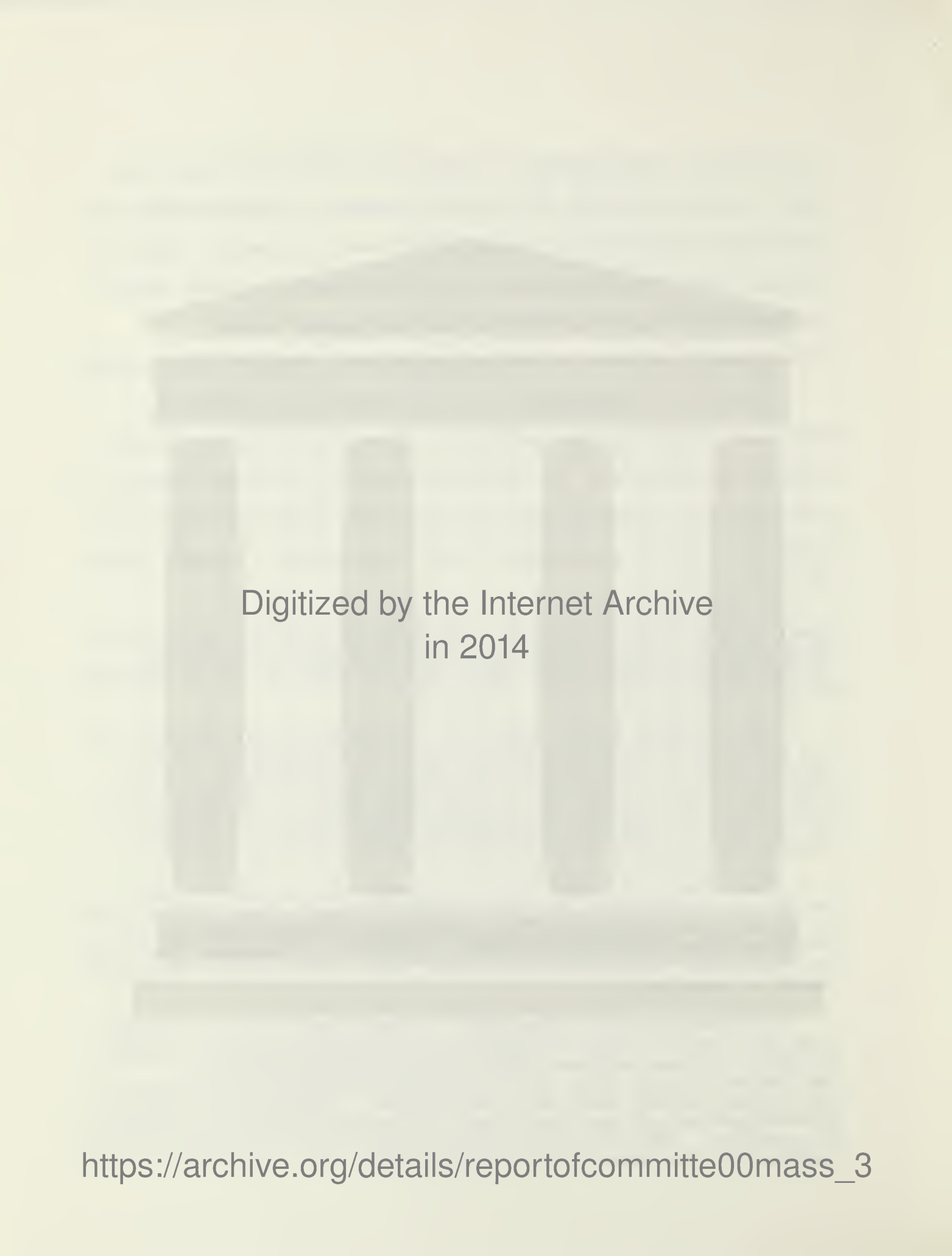
[1] From 1982 to 1986, the indigent case load in Massachusetts almost doubled, according to data set forth in an 1986 update of the 1982 Bureau of Justice Statistics of the United States Justice Department showing State by State Indigent Defense Statistics (1986). See Table 10.

The increase in the number of arraignments has stopped. In the Superior Court there were 8.5% fewer arraignments in 1991 (6,308) than in 1990 (6,896) according to the Office of the Commissioner of Probation. In the same period, District and Municipal Court adult arraignments decreased 6.4% (from 268,543 to 251,265). Juvenile arraignments have, however, remained substantially level between 1988 (18,429) and 1990 (18,770).

The number of trial court criminal cases involving the assignment of counsel was less in fiscal year 1991 (179,441) than in fiscal year 1990 (183,293), according to data maintained by the Committee for Public Counsel Services. It appears from data for the first five months of fiscal year 1992 that the downward trend is continuing.

[2] Massachusetts ranked 29th in the country in the average cost per case in 1982 according to a nationwide study, National Criminal Defense Systems Study (1982) conducted by The Spangenberg Group, Inc. for the Bureau of Justice Statistics of the United States Department of Justice. See Table 3. In 1986, Massachusetts had the ninth lowest cost per case of all States in the country. See Bureau of Justice 1986 Study, entitled Criminal Defense for the Poor, 1986, Tables 6, 9.



there are differences among judges in the way they view and implement Rule 3:10. Some judges may be appointing counsel in order to expedite the disposition of a case without paying adequate attention to the question of the defendant's indigency. This possibility is particularly apparent in appointments of counsel made at arraignment only for the determination of bail, a matter on which we shall report to the Court later.

There are also disparities among courts in the proportion of defendants who are determined to be indigent but able to contribute to the cost of counsel. It may be that the provisions on this subject in the proposed Rule 3:10 will be of assistance in causing a greater uniformity of treatment among judges on this question. We believe, however, that after the adoption of the proposed new rule, the District and Boston Municipal Departments should give attention to educational and supervisory programs to be certain that judges make appropriate determinations concerning people who might be in this category.

The major purpose of this memorandum is to propose to the Court, after its receipt of public comment, the adoption of a revision of Rule 3:10, a copy of which is set forth in Appendix B. After we discuss the proposed new rule, we shall then briefly note certain matters on which we suggest the Court should make recommendations for action and two matters on which this committee plans to report to the Court in the future.

General Comments on Proposed Revised Rule 3:10

The Committee for Public Counsel Services (CPCS) has provided the principal force behind the proposal for the adoption of a revised Rule 3:10. In August, 1991, by a memorandum that appears as Appendix C, the CPCS submitted to us proposed revisions that were the result of substantial analysis and consideration. Several proposals involved changes that would make the operation of the rule more equitable. For example, the CPCS proposed, and we have agreed, that any determination of the indigency of a person being supported by his or her parents, such as a student, should normally be based on the available funds of the student and the parents, as far as that information is reasonably ascertainable. This change, like certain others proposed, will require the expenditure of more time and effort in the determination of indigency than must be expended under present Rule 3:10. On the other hand, the evenhanded implementation of the proposed rule (along with the adoption of procedures for verification of information provided by criminal defendants that we shall recommend) should inject greater fairness and, in time, money saving into the process.

The format of the proposed new rule is somewhat different from present Rule 3:10. The new rule starts with definitions. The most important ones are the definitions of a party who is indigent (§ 1[f]) and of a party who is indigent but able to contribute (§ 1 [g]). In the present rule, definitions appear in

§ 6. The following schedule relates sections in the proposed rule to similar provisions in the present rule and indicates where substantive changes have and have not been made:

Proposed Rule	Present Rule	Substantive Change
§ 1	§ 6	new definitions; revisions in old ones
§ 2	§ 1	none
§ 3	§ 2	none
§ 4	§ 3, § 6(c)	no change in (a); new (b) added; form added
§ 5	§ 4	none
§ 6	§ 5	none
§ 7	none	new, but see old § 8 (c) (iii)
§ 8	§ 6 (b)	none
§ 9	§ 7	none
§ 10	§ 8	none except principles of old § 8 (c) (iii) are moved to new § 7

Discussion of Substantive Changes Proposed for Rule 3:10

SECTION ONE

Indigent. Under current Rule 3:10 a party is automatically classified as indigent if he or she is committed to a public

mental institution, is serving a sentence in a correctional institution, or is in custody in jail. Although most such persons are no doubt indigent under other aspects of the current definition of indigent, there are persons in these institutions who can afford counsel, or at least can afford to pay something toward the cost of counsel. Proposed Rule 3:10, in § 1 (iv), (v), and (vi), eliminates the automatic designation of such a person as indigent. Strictly speaking, revised clauses (iv), (v), and (vi) are not necessary because any party described in those clauses would be indigent under other provisions of the new rule anyway. We recommend, however, that, to emphasize the change, revised clauses (iv), (v), and (vi) be included in the proposed rule.

The proposed definition of indigent omits present subclause (E) of § 6 (a) (i). That subclause declares any person to be indigent if he or she is "unable to pay the anticipated cost of counsel for the matter(s) before the court because his available funds are insufficient to pay any amount for the retention of counsel." As the Memorandum from the CPCS indicates (see Appendix C, pp. 4 & 5), few States have such a provision. It is believed that the presence of such a provision increases the number of appointments of counsel.

The result of these changes is that under the proposed definitions the indigency determination becomes a purely mechanical one. It should be far easier to make an initial determination of indigency under the proposed definition than

under the current rule. A party is indigent who is receiving public assistance (the category in which traditionally approximately 80% of the people receiving appointed counsel have fallen)[3] or has an annual income, after taxes, 125% or less of the current poverty threshold. Note, however, the discretion granted to a judge under new § 4 (b), which we shall discuss later, to depart from the mechanical determination made by the definition of indigent.

Indigent but Able to Contribute. The proposed new definition of Indigent but Able to Contribute places any person in that category whose annual income after taxes is more than 125% and less than 250% of the current poverty threshold. There is no comparable provision in the current rule.

The old definition of Indigent but Able to Contribute in all instances required a comparison between the anticipated cost of counsel, as estimated by the CPCS, and the party's available funds. If the party could pay a portion but not all of the cost of counsel, he or she fell into that category. This concept is retained precisely with respect to a person charged with a felony within the jurisdiction of the Superior Court. As to other criminal charges, it has been eliminated, subject again, however, to the judge's discretionary authority under new § 4 (b).

Available Funds. The basic definition of Available Funds is retained from the present rule. The proposed rule expands on

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[3] With recent changes in eligibility standards the percentage may now be below 80%.

various aspects of the present rule. Under § 1 (b) (ii) of the proposed rule, which has some similarity to the last sentence of present § 6 (a) (iv) (B), the liquid assets and income of any parent or spouse (or person in substantially the same relationship) living in a party's residence will be considered, with an exception to be noted, in determining the party's status if that other person substantially contributes to the household's basic living expenses. Under § 1 (b) (iii), if any party, such as a student, is substantially supported by a parent or is claimed as a dependent for tax purposes, the available funds of the parent (or guardian) shall be considered, subject to the same exception. The available funds of a parent shall be considered, subject to the same exception, with respect to any party under seventeen years of age. See § 1 (b) (iv). In all these instances, there is an exception that the funds of a parent (or guardian) shall not be included if the interest of that person is adverse in the proceeding.

We recognize that these provisions will present practical problems for probation officers in the implementation of the proposed rule. Information concerning the available funds of a parent (or other person described in these clauses) may not be readily available at the time any indigency determination must be made or even easily obtainable on subsequent investigation. We concluded that the broader definition of available funds should be used even if, as a practical matter, it will not always be possible to apply it in full. There is no reason to require the

expenditure of public funds for counsel when, for example, the parents of a party are supporting him or her in college (or elsewhere), and they can afford to pay the reasonable cost of counsel.

On a separate matter, we observe that judges will have to use discretion in deciding whether a person living in the defendant's household is in substantially the same relationship as a spouse.

Other Definitions in § 1. Certain lesser changes have been made from the present rule in proposed definitions that concern the determination of available funds. Liquid assets will now include equity in any tangible property if it is reasonably convertible to cash. Reasonably convertible is intended to include the concept of the timeliness of any possible conversion. Also any motor vehicle, not just one motor vehicle, needed to maintain employment is excluded from liquid assets. Income now will explicitly include rental income and will not be limited, as now, just to income reportable for Federal tax purposes. Basic Living Costs will include reasonable loan payments toward living costs but will no longer include all court-imposed obligations, just support payments.

SECTION FOUR

Under § 4, applying the definitions of § 1, a judge must place a party who neither waives counsel nor obtains counsel into

one of three categories: (1) indigent, (2) indigent but able to contribute, or (3) not indigent. Section 4 (b), however, provides discretion to a judge to disregard the strict limitations of the definitions and to place a party in a category other than that called for by the definitions, provided that the judge sets forth findings on the record in explanation of his or her action and provided further that the action is warranted either by special circumstances or by the party's available funds in relation to his basic living costs. A judge would be justified in not treating as indigent a party who fell within the definition of indigent, if the party had a substantial asset (or assets) reasonably converted to cash.[4] Depending on the value of the asset (or assets), and considering all the relevant factors, a judge might determine that such a party was indigent but able to contribute or perhaps even not indigent at all. Conversely, for example, a party might have an income, after taxes, that was 250% or more of the then current poverty level (and not otherwise qualify as indigent but able to contribute) and yet, because of considerable basic living costs, not have available funds sufficient to afford the reasonable cost of counsel in whole or even in part, and thus a judge could fairly and appropriately put such a party in the categories of indigent or indigent but able to contribute.

Section 4 (b) is not intended to give judges discretion to

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[4] The definition of indigent pays no attention to a party's assets. Only his or her public assistance status or income are considered.

disregard the categories established by the definitions of § 1. The requirements of § 4 (b) that a judge who departs from the definitions of § 1 must have a reason permissible within the scope of § 4 (b)'s authorization and that the judge must make findings on the record in support of the decision are designed to limit deviations from the general definitions of Rule 3:10.

SECTION SEVEN

This proposed section is essentially new, although it incorporates the idea in current § 8 (c) (iii) that authorizes a judge, before the case is over, to reconsider the assignment of counsel if a party acquires or is about to acquire assets that have become or will become available funds. In the proposed rule, a party's indigency status may be reviewed at any time because of a party's change in financial circumstances. § 7 (a). A party may at any time obtain a reconsideration of a judge's indigency determination. § 7 (b). Finally and most importantly, any party who has put up his own funds or other assets to meet a bail obligation and has been determined to be indigent or indigent but able to contribute, must have his indigency status reconsidered before the bail money or other assets are released. § 7 (c). If services have already been furnished, the judge may order that all or part of those assets be paid toward the cost of counsel services already furnished. Assets of other persons associated with a party, such as parents or a spouse, and

deposited to meet a bail obligation, are to be treated as funds (or assets) of the party to the same extent that under § 1 (b) the available funds of such other person are included in determining the party's available funds.

Other Matters Related to the Operation of Rule 3:10

Our recommendation that a revised Rule 3:10 be adopted responds to the major portion of this committee's assigned task. In the course of our work, various other related matters have been discussed. The remainder of this memorandum deals with these matters.

1. Direct Verification of Public Assistance Status. A person is defined as indigent if he or she is receiving certain types of public assistance. Approximately 80% of the defendants who are found to be indigent fall into this category. Many of these people would be indigent for one or more other reasons as well. The integrity and efficiency of the system would be enhanced measurably if probation officers in the various courts could have direct and immediate access to information bearing on the public assistance status of parties who assert their indigency because they are receiving public assistance. A pilot study conducted by the Commissioner of Probation in cooperation with the executive department could demonstrate that the ability to verify a party's public assistance status immediately would prevent improper requests for the appointment of counsel.

2. Post-audit Verification. It had been thought historically that a review of information on which indigency

determinations have been made would not produce a net revenue gain but that it might discourage cheating and might catch certain people who did cheat. More recently, there is some indication from practices in other States that a well-run verification system could produce a net revenue gain. The subject should be pursued. It will require additional personnel.

This committee has tried to test the accuracy of representations of indigency against records in the Department of Revenue, but we have not yet been able to obtain information from that Department. We think that a verification system could identify defendants who have misrepresented their income and that general knowledge of the existence of a verification system, using Department of Revenue records and other records, would discourage misrepresentations and might result in the recovery of improperly spent funds.

We are aware that the Legislature has under consideration proposals that the Commissioner of Probation conduct pilot programs to permit (1) direct verification of a defendant's public assistance status and (2) the verification of information on which determinations of indigency were based.

3. Recoupment Procedures. Although the subject requires legislation and could not be implemented by rule alone, we recommend that the probation department, the Office of the Chief Administrative Justice, and the Legislature consider means by which persons who are determined to be indigent can be required to pay the Commonwealth back for their defense if they obtain

available funds, from whatever source, during the course of the criminal proceeding and for some period thereafter (including at least during any probationary period). When the criminal trial has not yet been held, the proposed rule requires that a person's status as an indigent be reconsidered when information appears that suggests that the person is no longer indigent. This redetermination of one's status as an indigent may not alone be sufficient. Payment for past services may properly be required. Perhaps a written promise, received at the time counsel is appointed, to reimburse the Commonwealth for the cost of counsel if a party ceases to be indigent would be worth obtaining. The possibilities should be explored with care, however, so as not to interfere with (a) the due process rights of any person to be "backcharged" or (b) a criminal defendant's right to counsel. This subject can probably be best addressed initially by a coordinated effort of the probation department and representatives of the executive department.

4. Elimination of Imprisonment as a Punishment for Certain Crimes. The constitutional right to counsel that underlies the rule requirement that counsel be appointed for an indigent criminal defendant exists only when incarceration is a possible penalty upon conviction of a crime. A survey of sixty-nine District Court chief probation officers disclosed a number of crimes for which, in their experience, incarceration never occurs upon a first conviction of the crime. The Legislature may wish to consider eliminating incarceration as a penalty for the first

conviction of particular crimes. Among the crimes most mentioned (i.e. by more than 50 chief probation officers) as to which counsel is assigned and incarceration never occurs for a first offense are possession of a controlled substance, operating an uninsured motor vehicle, trespass, and operating a motor vehicle after a license is suspended. We recognize that, for public policy reasons, the Legislature might not want to eliminate imprisonment as a possible penalty for particular crimes, drug possession for example. There may, however, be some savings possible by eliminating imprisonment as a possible consequence of the conviction of certain crimes. This is purely a question for the Legislature.[5]

5. Appointments of Counsel Only for the Purpose of Bail Determinations. Many appointments of counsel are made solely for the purpose of deciding at arraignment whether a person charged with a crime should be admitted to bail. We believe that judges often have made such appointments without first determining that the accused is indigent. Although that practice is not proper under current Rule 3:10, overall it may have saved the Commonwealth money. Appointments of counsel for bail only occur when a person who being arraigned appears without counsel. In such an instance, if the defendant is not indigent and wishes to

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[5] This committee is aware of G. L. c. 211D, § 2A, as amended last year, under which a judge need not appoint counsel if the judge informs the defendant that his sentence will not include incarceration. There are possible problems in the use of such a procedure. See District Court Department, Bulletin No. 1-92, p.8 (February 28, 1992).

obtain counsel before a bail hearing is held, the defendant may have to be held in custody until the bail hearing is held. The expense to the Commonwealth, and the burden on the correctional system in such a case, often make the appointment of counsel at public expense without regard to indigency a practical and expeditious procedure. This committee intends to study the subject further to see what might be done to improve the current situation.

6. Appointment of Counsel in Non-Criminal Cases. The operation of Rule 3:10 concerns in part the appointment of counsel for parties in various kinds of civil actions. We intend to consider the various circumstances in which counsel must or may be appointed in civil cases and to determine whether any savings or improvements are possible. The amount of money spent on such appointments is small relative to the amount spent on the defense of criminal cases, but in recent years the amount has been growing.[6]

Conclusion

We recommend that the Court release this report and proposed rule, that the proposed rule be published for comment in the usual way, and that any substantial comments on the proposed rule be referred back to this committee for its review. If there are no such comments, we recommend that the proposed rule be adopted

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[6] The cost of counsel for noncriminal matters has increased from 19.4% of total private counsel costs in fiscal year 1988 to 23.4% in fiscal year 1991.

with an effective date that will allow sufficient time for the preparation of the new forms that will be used in conjunction with the rule.

Because the work of this committee was undertaken in response of a legislative request for a study to which the Court agreed, we recommend that copies of the proposed rule and report should be sent to the Governor and the legislative leadership.

APPENDIX A

SJC Committee on Determination of Indigency
for the Appointment of Counsel

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APPENDIX B

RULE 3:10 ASSIGNMENT OF COUNSEL

(Applicable to all courts)

Section 1. Definitions The following definitions apply in this rule:

(a) Anticipated Cost of Counsel -- The cost of retaining private counsel for the defense of a felony within the jurisdiction of the Superior Court, as estimated and published from time to time by the Committee for Public Counsel Services.

(b) Available Funds --

(i) General Definition. A party's liquid assets and disposable net monthly income calculated after provision is made for the party's bail obligations.

(ii) Certain Assets and Income of Party's Household. A party's available funds shall include the liquid assets and disposable net monthly income of the party's spouse (or person in substantially the same relationship) and each of the party's parents, provided, in each instance, any such person lives in the same residence as the defendant and contributes substantially toward the household's basic living expenses, unless that other person has an adverse interest in the proceeding (e.g., is the victim, complainant, or petitioning party, is a prospective prosecution witness, or is a party, if it is a civil matter).

(iii) Available Funds of a Party over Sixteen Supported by Another. The available funds of any party over the

age of sixteen who is substantially supported by a parent or parents or by a guardian, or who continues to be claimed as a dependent for tax purposes, shall include the available funds of that person's parent or parents or guardian, except when that other person has an adverse interest in the proceeding.

(iv) Available Funds of a Party under Seventeen. The available funds of a party under the age of seventeen (including a child allegedly in need of services and an allegedly delinquent child, as defined in G. L. c. 119, §§ 21 & 52, respectively) shall include available funds of the child's parents or guardian, regardless of their place of residence, except when that other person has an adverse interest in the proceeding.

(c) Basic Living Costs -- The average monthly amount spent for reasonable payments, including loan payments, toward living costs, such as shelter, food, utilities, health care, transportation, clothing, education, and support payments.

(d) Disposable Net Monthly Income -- The income remaining each month after deducting income taxes, social security taxes, contributory retirement, union dues, and basic living costs.

(e) Income -- Salary, wages, interest, dividends, rental income, and other earnings and cash payments, such as amounts received from pensions, annuities, social security, and public assistance programs.

(f) Indigent -- A party who is:

(i) receiving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC),

General Relief (GR), poverty related veterans' benefits, food stamps, refugee resettlement benefits, Medicaid, or Supplemental Security Income (SSI);

(ii) receiving an annual income, after taxes, one hundred twenty-five percent or less of the then current poverty threshold referred to in G. L. c. 261, § 27A (b);

(iii) charged with a felony within the jurisdiction of the Superior Court and has no available funds;

(iv) committed to a public mental health facility and has no available funds, including a beneficial interest in a trust;

(v) serving a sentence in a correctional institution and has no available funds; or

(vi) held in custody in jail and has no available funds.

(g) Indigent but Able to Contribute -- A party who

(i) has an annual income, after taxes, of more than one hundred twenty-five percent and less than two hundred fifty percent of the then current poverty threshold referred to in G. L. c. 261, § 27A (b), or

(ii) is charged with a felony within the jurisdiction of the Superior Court and whose available funds are insufficient to pay the anticipated cost of counsel for the defense of the felony but are sufficient to pay a portion of that cost.

(h) Liquid Assets -- Cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real

estate, and equity in a motor vehicle or in other tangible property; provided that any equity in real or personal property is reasonably convertible to cash. Any motor vehicle necessary to maintain employment shall not be considered a liquid asset.

(i) Party. A defendant in a criminal proceeding, a juvenile in a delinquency proceeding, and any person, including a juvenile, in a civil matter in which the person has a right to counsel.

Section 2. Advice as to Right to Counsel. If any party to a proceeding in which the law of the Commonwealth or the rules of this court establish a right to be represented by counsel initially appears in any court without counsel, the judge shall advise the party, or if the party is a juvenile, the juvenile and a parent or legal guardian, where appropriate, that: (a) the law requires that counsel be available in the proceeding, at public expense if necessary and (b) if the court finds that the party wants counsel and cannot afford counsel, the Committee for Public Counsel Services will provide counsel at no cost or at a reduced cost. Thereafter, the judge shall make findings as provided in the following sections of this rule.

Section 3. Waiver of Counsel. If the party knowingly elects to proceed without counsel, a written waiver by the party and a certificate of the judge on the form hereafter provided in this

Section shall be signed by the party and the judge, respectively, and filed with the papers in the case. If the party knowingly elects to proceed without counsel but refuses to sign the form hereafter provided, the judge shall so certify on that form, which shall be filed with the papers in the case. The following waiver form shall be used as provided in this Section.

[WAIVER FORM]

Section 4. Determination of Indigency Status.

(a) If the judge finds that the party has not knowingly elected to proceed without counsel and the party does not arrange to obtain counsel, the judge shall receive a written report and opinion as to indigency from a probation officer or other appropriate court employee as provided in Section 8 of this rule. After reviewing the report and opinion and interrogating the party, as appropriate, the judge shall make one of the following three determinations:

(i) the party is indigent,

(ii) the party is indigent but able to contribute, or

(iii) the party is not indigent.

The judge shall enter findings on the following form, which shall be filed with the papers in the case.

[The form for Justice's Determination With Respect to Indigency Pursuant to Rule 3:10 will have to be revised to conform to changes in the rule.]

(b) In making the determination called for by this Section,

the judge shall apply the definitions of indigent and indigent but able to contribute set forth in Section 1 of this rule. In spite of the determination that the application of those definitions indicates, a judge nevertheless may place a party in either of the other categories described in Section 4 (a), based on a consideration of the party's available funds in relation to the party's basic living costs or based on special circumstances, or both, provided that the judge sets forth in findings on the record the reason for doing so.

Section 5. Assignment of Counsel/Notice of Assignment. If under Section 4 of this rule the judge finds that a party is in category (i) or (ii) of Section 4 (a), the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate use of a different procedure that is consistent with G. L. c. 211D and the rules of this court. The court clerk or register shall promptly complete and transmit a Notice of Assignment of Counsel Form, provided by the Committee for Public Counsel Services with the approval of this court, to the party and shall file a copy with the papers in the case.

If under Section 4 of this rule a judge has found that a party is not indigent, but after a reasonable time the party has not waived counsel, procured counsel, or seasonably petitioned the court for the appointment of counsel on the basis that, after a reasonable effort, the party has been unable to retain counsel

because of financial reasons, then the case may be ordered to proceed.

[Form to be adopted for NOTICE OF ASSIGNMENT OF COUNSEL.]

Section 6. Standby Counsel. Notwithstanding a party's waiver of counsel, the judge may assign counsel in accordance with this rule to be available to assist the party in the course of the proceedings.

Section 7. Review of Indigency Determination.

(a) A party's indigency status may be reviewed at any stage of a court proceeding if information regarding a change in financial circumstances becomes available to a probation officer or other appropriate court employee, through the court's verification system, or from some other source, including the party.

(b) A party has the right to reconsideration in a formal hearing of the findings and conclusion as to the party's entitlement to assigned counsel before the judge who made the determination, if available, or otherwise before another judge.

(c) If a party has been determined to be indigent or indigent but able to contribute and has deposited funds, or other assets, owned by the party in order to meet a bail obligation, a redetermination of indigency shall be made before the deposited funds, or other assets, are released. Following that hearing, depending on the circumstances, the judge may change the party's

status under this Section and, alternatively or additionally, may order that all or part of the deposited funds, or other assets, be paid to the clerk of court as payment toward the cost of counsel services already rendered or to be rendered. In determining whether the funds or other assets deposited are to be treated as funds or other assets of the party, the judge shall be guided by the same considerations that apply under Section 1 (b) in determining a party's available funds.

Section 8. Report by Probation Officer or Other Appropriate Court Employee. The probation officer or other appropriate court employee shall provide to the judge a written report and opinion as to indigency on a form prescribed by this court* based on information obtained from the party and subject to a verification system established by the Chief Administrative Justice of the Trial Court. The form shall include information necessary to provide a basis for making a determination with respect to indigency as provided in this rule.

*[The entire Determination of Indigency Report will have to be revised to conform to changes in rule 3:10.]

Section 9. Inadmissibility of Information Obtained from a Party. No information provided by a party pursuant to this rule may be used in any criminal or civil proceeding against the party except in a prosecution for perjury or contempt committed in providing such information.

Section 10. Counsel for Parties Indigent and Indigent but Able to Contribute.

(a) Appearance of Counsel. Counsel assigned by the Committee for Public Counsel Services to represent a party pursuant to this rule shall file an appearance in the case within forty-eight hours after notification of the assignment.

(b) Withdrawal of Appearance. If counsel assigned by the Committee for Public Counsel Services, who has filed an appearance, is unable or unwilling to represent a party, he shall move to withdraw his appearance. If the court consents to the motion for withdrawal, the court shall immediately notify the Committee for Public Counsel Services to make a new assignment of counsel.

(c) Payment of Counsel Costs.

(i) While determined to be indigent, a party may not be ordered, required, or solicited to make any payment toward the cost of counsel, except for an order entered pursuant to G. L. c. 211D, § 2A.

(ii) If a party is determined to be indigent but able to contribute, the judge shall order the party to pay a reasonable amount to the probation officer or other appropriate court employee toward the cost of counsel in addition to assessing a legal counsel fee as provided in G. L. c. 211D, § 2A.

(iii) All funds received as payment toward the cost of counsel, including amounts received pursuant to G. L. c. 211D, § 2A, shall be deposited with the State Treasurer in accordance

with law.

APPENDIX C

MEMORANDUM

TO: The Honorable Herbert P. Wilkins, Associate Justice, Massachusetts Supreme Judicial Court
Chair, Wilkins Committee on Indigency

FROM: The Committee for Public Counsel Services

DATE: August 23, 1991

RE: Proposed Revision of SJC Rule 3:10 - Indigency Standard, and Recommended Procedural Changes for Indigency Determination Process

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Over the course of the last several months, the Committee for Public Counsel Services has conducted a review of the indigency standard currently being applied in determining who is eligible for appointed counsel at public expense, as defined by Supreme Judicial Court Rule 3:10. This review is part of a broad effort that has been undertaken to examine the policies and procedures relating to the provision of appointed counsel and to determine if changes can be made to improve the administrative, operational, and cost efficiency of the Committee's services.

To conduct this review, a special Subcommittee on Indigency was formed, consisting of Committee members Marie Buckley, Esq. and David Hallinan, Esq., as well as staff attorneys Leslie Walker and Lisa Hewitt. In addition, the Subcommittee has been assisted in its efforts by The Spangenberg Group, a research and consulting firm based in West Newton, Massachusetts that is nationally recognized as the leading experts in the field of indigent defense. The Group's services have been made available to the Committee under the auspices of the American Bar Association's Bar Information Program, for whom they are the primary providers of technical assistance. (Robert L. Spangenberg, President of The Spangenberg Group, is also a member of the Committee.)

The Subcommittee has carefully reviewed the current indigency standard, witnessed the indigency determination process in several court locations, interviewed probation officers about the standard and procedures employed in its application, examined pertinent case and cost statistics, and reviewed indigency standards and determination procedures used in other jurisdictions. The results of this in-depth examination have been shared with the full Committee during several lengthy discussions focusing on both the broad policy questions relating to the definition of indigency and the practical implications of changes intended to ensure that only the truly needy receive appointed counsel at public expense. On July

23, 1991 the Committee held a special meeting on indigency standards at which it unanimously voted for a proposed revision of Rule 3:10. We feel that it is appropriate at this time to share with you and your Committee the conclusions that we have reached in our deliberations, hoping that they will assist in your own analysis of the indigency standard and determination process. We anticipate that our review of this matter and other related issues will be continuing over the next several months and that we may further refine and/or amend these initial recommendations. Naturally, we would be pleased to respond to any questions or comments from you and your Committee as we continue this review.

Our initial recommendations fall into two categories: (1) proposed draft revisions to SJC Rule 3:10; and (2) possible changes in the procedures for indigency screening and for the verification of financial information. Each of these issues is discussed separately below.

Proposed Revisions to SJC Rule 3:10

Attached is a proposed draft revision of SJC Rule 3:10. (Language that we are proposing be added to the existing rule is underlined, while any language being suggested for elimination is struck out.) For purposes of clarity and continuity, we have followed the style and format of the existing Rule 3:10 in suggesting changes. The most significant of the recommended changes are in Section 6, Establishing Indigency, which includes all of the definitions key to the indigency determination process. Where necessary and appropriate, these changes are reflected in the other sections of the Rule (with the exception that we have made no attempt to alter the forms included in the rule to reflect any recommended changes).

The proposed changes are intended to accomplish the following primary objectives:

- alter the per se assumptions of indigency for persons committed to public mental health facilities, those serving a sentence in correctional institutions, and those held in custody in jail by allowing for a review of their available income and assets as well as, in the latter two categories, allowing for a review of their indigency status upon release;

- allow for the inclusion of family income and assets in the calculation of available funds, particularly for juveniles and those over the age of 17 still being supported or claimed as dependents by their parents, in part in order to address the problems with students attending schools and colleges in the Commonwealth receiving appointed counsel;

- provide for the review of indigency status at any stage of the court proceedings, upon notice of a change in financial circumstances from any party, including the defendant;

- eliminate the provisions allowing for the consideration of the anticipated cost of counsel, except for felonies punishable with life imprisonment and felonies within the jurisdiction of the Superior Court;

- require judges to order parties determined to be indigent but able to contribute to pay a reasonable amount toward the cost of their representation, in addition to the required $40 counsel fee; and

- create a right to reconsideration of the indigency determination.

In addition, a few changes have been suggested simply for purposes of clarifying the language and intent of the Rule.

1. The per se assumptions of indigency that are addressed in these revisions in Section 6(a)(i)(B)(C) and (D) represent those categories--persons committed to public mental health facilities, those incarcerated in prison, and those held in custody in jail--that have raised serious questions and concerns among some observers in the courts and in the Legislature. It should be recognized that the numbers of such individuals who actually have income and/or assets may not be large, and additional scrutiny of their financial resources may not result in significant savings through avoiding the appointment of counsel particularly as there will be administrative cost associated with the review. Nonetheless, there may be important gains in enhancing the credibility of the system to be realized by eliminating what appear to be some of the more troubling examples of potential abuse of the system.[1]

2. Another category of defendants that has been a significant problem in certain courts throughout the Commonwealth in regard to their indigency status is students. The perception is that many students attending schools and colleges in the Commonwealth are receiving counsel at public expense while their families have income and assets that would enable them to hire counsel on the

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[1]As we were concluding our discussions on this issue, the Legislature passed an amendment to Section 18 of Chapter 123 of the General Laws, which requires that a person who is a resident in a facility of the Department of Mental Health or in the Bridgewater State Hospital and who has funds held in trust by DMH or DOC shall contribute toward the cost of appointed counsel. Any final revisions to Rule 3:10 will have to take into account this recent statutory revision.

students' behalf. The proposed changes in Section 6(a)(v) protect against this happening by establishing a presumption that students' families' (or guardians') income and assets be taken into account in determining indigency, absent a showing that the student is legally emancipated or that the family members have an adverse interest that would make it impossible to rely on them for financial assistance.

3. On the assumption that the practical result of our combined recommendations is to make the indigency standard stricter and thus to make it more difficult to get appointed counsel, we felt it necessary to balance this outcome with a broader provision for review of indigency status at any stage in the court proceeding when information about a change in financial status becomes available (including, by presumption, the ability of a defendant previously declared not indigent to present information showing worsened financial circumstances). This is incorporated into the proposed revision as a new Section 6(a)(iv) replacing Section 8(c)(iii) which allowed only the judge to initiate a re-examination of a party's indigency status. Further, it was felt that creating the opportunity for individuals to request reconsideration of the courts' finding as to indigency, absent a change in financial circumstances, would improve the due process safeguards in the indigency determination process in a new Section 6(d).

4. A fundamental and far-reaching change that is proposed in the Rule is the elimination of the provision allowing for consideration of the anticipated cost of counsel in determining indigency, except in felonies punishable with life imprisonment and those within the jurisdiction of the Superior Court. There is a certain logic to including such a provision in the indigency determination calculus--recognizing that retaining private counsel can be a costly proposition that would create a hardship even for defendants with assets--however, it is not the norm throughout the country. Further, while the evidence is largely anecdotal, there seems to be little question that the inclusion of such a provision increases the number of indigent appointments of counsel.

According to a review of eligibility screening procedures conducted by members of The Spangenberg Group for the National Institute of Justice in 1986[2], only six states (including Massachusetts) and the District of Columbia utilized such provisions. Since that time, only a couple more states have added anticipated cost of counsel provisions to their indigency standards. Only a few states in the country provide appointed counsel in a large volume of cases similar to the rate of appointment in

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[2]Robert Spangenberg, et al. Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures (Washington, D.C.: U.S. Dept. of Justice, September 1986).

Massachusetts, including, for example, Oregon and Washington. While there may be varying reasons in each of these high volume states, it is interesting to note that each also includes as part of its indigency standard reference to the anticipated cost of counsel.

In making these recommendations in regard to the anticipated cost of counsel, we have attempted to balance our desire to control the number (and cost) of cases in which counsel is appointed with our concern that the constitutional right to counsel be upheld. Thus, we have retained the provision for the most serious felonies, those in which the costs of retaining private counsel may be so high as to be prohibitive even for defendants with assets, while eliminating it for the more numerous and less serious felonies and misdemeanors under the jurisdiction of the District Court. For those cases in which there will continue to be reference to the anticipated cost of counsel in the determination of indigency, we feel strongly that the current schedule of costs needs to be updated to more accurately reflect the true costs of private representation on those matters. The schedule, adopted in 1986, now sets the anticipated cost of counsel in a murder case, for example, at $5,000. The amendment of this schedule of costs will be one of the major tasks undertaken as we continue our review of the indigency determination process generally.

The proposed changes in reference to the anticipated cost of counsel result in a re-definition of the category "indigent but able to contribute" found in Section 6(a)(ii). The revised section includes a subsection (A) providing for consideration of the anticipated cost of counsel in felonies punishable with life imprisonment and those within the jurisdiction of the Superior Court. The new subsection (B), that would apply to all other cases in which a person was not deemed to be per se indigent, relies on a reference to defendants' annual income, after taxes, setting a ceiling above which counsel cannot be appointed, unless a judge determines that exceptional circumstances warrant such appointment. This income ceiling is defined as 250% of the current poverty threshold, or $16,550 for a single individual and $33,500 for a family of four.

We recognize that some of those who would now be deemed not indigent (who would have been defined as indigent but able to contribute and been appointed counsel under the old standard) might simply be unable to retain private counsel, resulting in increases in pro se representation and in court delay. Thus, a new subsection (C) of Section (6)(a)(ii) was created to allow such individuals the opportunity to petition the court to receive appointed counsel. Similar provisions in other states require defendants to document their inability to secure private counsel by obtaining signatures from several private attorneys who have declined to accept the case for financial reasons, before appointed counsel can be made available. However, upon examination, we have

rejected such a requirement as too cumbersome and inefficient.

5. Finally, we are recommending that the provisions for the payment of counsel costs in Section 8(c)(ii) be revised to require that the judge order those parties determined to be indigent but able to contribute to pay a reasonable amount toward the cost of their representation and to document how the fee amount was established, in addition to also assessing the $40 legal counsel fee in all such cases. This is in response to evidence suggesting that both assessments are regularly imposed in only a few courts in the Commonwealth.

Proposed Procedural Changes

The Committee has identified two related procedural issues that it would recommend be addressed in improving the indigency determination process as a whole. These are: (1) the creation of an independent screening agency to determine eligibility for appointed counsel; and (2) the systematic verification of financial information provided by defendants. Similar issues have recently been addressed in the State Auditor's Report on the Activities of the Committee for Public Counsel Services July 1, 1987 to June 30, 1990 (No. 90-4008-3), a copy of the relevant portions of which is attached for your information.

The experience in Massachusetts (and in other states where indigency screening is the responsibility of the Probation Department) is that it is often difficult for probation officers to take the time required to screen defendants adequately, much less to be able to follow up and verify the information provided, due to the press of the many other responsibilities they have. Our observations indicate that there is considerable inconsistency in how the indigency standard is currently applied by probation officers in the various courts throughout the state. According to the Auditor's Report referred to above, they

> acknowledge that it is the Probation Department's responsibility to determine whether or not an individual meets the definition of indigency (and therefore is entitled to state-funded legal counsel) and to make its recommendation to the judge based on this determination. However, while limited verification procedures have been established...currently there is no effective system for a judge or probation officers to verify the information provided by all individuals on these 'determination of indigency' reports. (page 38)

Independent screening agencies have proven in other jurisdictions to be the best mechanism for providing consistent application of indigency standards and seem to be best equipped to take the time to verify information. Independent screening units in Oregon have shown a consistent rate of 14% reductions in the number

of appointments after verification over the course of the first year and a half of operations in all the courts throughout the state. These units were established statewide after a successful experiment in five selected courts.

Creation of such an independent screening agency in Massachusetts would require the hiring of additional personnel to fulfill both the screening and verification functions. However, it would require the addition of only one or two personnel in most courts (with the exception of the largest urban courts) and these individuals can be hired at salaries significantly less than those that are paid to probation officers. Further consideration would have to be given to where in the government such agencies might appropriately be housed (e.g., Department of Probation, Department of Revenue, Trial Court?) or whether this might be a function that could be handled by a private agency.

We have voted unanimously to propose to the Legislature that such screening units be set up in several courts on a limited basis (as was done in Oregon) to determine whether or not the savings realized more than compensate for the additional costs, resulting in a net cost saving for the Commonwealth. For example, screening units might be established in three types of courts, representing the different case volumes experienced in the urban, suburban, and rural areas of the state. Such units should probably operate on several shifts, so that screeners can be available in the early morning hours to interview in-custody defendants prior to arraignment, as well as to be available in early evening hours to accommodate employed out-of-custody defendants who would be required to provide evidence of their financial status as part of the verification process.

Preliminary discussions have disclosed a significant interest in this proposal by executive and legislative branch members. It is conceivable that the proposal may be considered by the legislature along with the supplemental budget in September. We hope to work closely with the court in shaping an effective and viable proposal for indigency verification.